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IN THE
# Supreme Court of the United States
October Term, 1991

F. Dale Robertson, Chief, United States Forest Service, The United States Forest Service, and Manuel Lujan, Jr., Secretary of the Interior,

*Petitioners,*

v.

Seattle Audubon Society, *et al.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## BRIEF FOR AMICI CURIAE*

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Fisher, *Budgets, Concepts and Terminology: The Appropriations Phase,* in 1 *Studies in Taxation, Public Finance and Related Subjects - A Compendium,* 437 (Fund for Public Policy Research 1977) . . . . . 23

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## STATEMENT OF INTEREST OF AMICI CURIAE

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Amici, the states of Florida, Texas, Minnesota, Arkansas, Nevada, Mississippi, Maine, New Jersey, Ohio, Connecticut, North Dakota, and Arizona, have a fundamental interest in the outcome of this case. States represent their residents' interests in federal court across a broad spectrum of social issues, including but not limited to environmental issues involving federal agencies. If special interests unable to garner the votes to amend legislation are nevertheless allowed to push through provisions that dictate how the courts are to apply existing laws in the context of particular facts

in pending cases, states will no longer be able to rely on the independence and objectivity of the federal courts in cases where the states are attempting to protect their residents' interests. When Congressional action threatens the courts' Article III powers, therefore, as it has in the instant case, the sovereign interests of the states are also threatened. Quite apart from the merits of the underlying litigation in this case, or even the survival of the northern spotted owl as a species, the states are concerned with the precedent of Congress invading the decisionmaking process in cases pending before the federal judiciary, and dictating the outcome in those cases.

Amici states have a profound interest in the proper allocation of judicial, legislative, and executive powers among the three branches of the federal government. This interest dates back to the formation of the Constitution, where states unhappy with the Articles of Confederation argued for an independent judiciary capable of addressing excesses by the legislative and executive branches of federal government.[1] The interest of the states in an independent judiciary is as vital today as it was at the time the Constitution was written.

Amici urge the Court to affirm the decision of the court of appeals that § 318(b)(6)(A) violates the Constitution's separation of powers. Although Congress has broad powers

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1 "It was no doubt the experience of the members of the Convention arising from the limited judicial system under the Articles that caused a unanimous demand for a separate, independent and supreme judicial tribunal." D. Watson, *The Constitution of the United States: Its History, Application, and Construction* (1910). In fact, the Constitutions of several states served as the model for an independent federal judiciary. As Alexander Hamilton noted: "These considerations teach us to applaud the wisdom of those States who have committed the judicial power in the last resort, not to a part of the Legislature, but to distinct and independent bodies of men." *The Federalist* No. 81.

to legislate, and to determine the size and reach of the federal judiciary, those powers must be restricted when they are used to dictate the outcome in particular pending cases.

## SUMMARY OF ARGUMENT

1. Although statutes should be read where possible to avoid constitutional issues, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication...." *Commodity Futures Trading Comm'n. v. Schor,* 478 U.S. 833, 841 (1986). Petitioners urge the Court to adopt an interpretation of § 318(b)(6)(A) that would avoid a constitutional issue, but which ignores the "legislative will" behind § 318(b)(6)(A). Section 318(b)(6)(A) was intended to, and did in fact, dictate a particular result in two pending cases identified by name and docket number in the statute itself. That is a core judicial function reserved to the judicial branch of government by Article III, § 1, of the United States Constitution.

Petitioners' argument that § 318(b)(6)(A) should be read as amending the laws at issue in the cases it identifies, rather than directing an outcome in those cases, fails to identify any language in § 318(b)(6)(A) stating or implying that Congress intended to amend any existing laws. To the contrary, Congress said in § 318(b)(6)(A) that specified agency action was "adequate consideration for the purpose of *meeting* the statutory requirements that are the basis for [these cases]." Rather than repealing or modifying the underlying environmental statutes, this language assumes that "the statutory requirements" *are* in place, and determines what action will meet the requirements of these laws.

This straightforward reading is confirmed by the legislative history of § 318. The conference committee report specifically states that § 318 "in no way alters application of the Endangered Species Act or other environmental laws to

Forest Service and BLM management activities." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89. The genesis of § 318(b)(6)(A), and the specific direction in that section that the laws at issue in these two cases have received "adequate consideration," reveals that § 318(b)(6)(A) was not concerned with the general legal significance of particular facts, but rather was concerned with the outcome in the identified cases. In this respect, this case is identical to *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872), in which this Court found that a statute "deeming" a presidential pardon to be conclusive evidence of disloyalty was an unconstitutional legislative attempt to dictate a result in pending cases.

2. Congress may not constitutionally exercise functions that are at the core of the power allocated to the judiciary by Article III of the United States Constitution. No power is more central to the judicial function than the power to apply the law to specific facts in the context of particular cases. Section 318(b)(6)(A) represents an attempt by Congress to exercise this judicial power by determining how the law is to be applied to the facts in these cases.

Petitioners' attempts to limit *Klein* to circumstances in which Congress has precluded Article III review of invasions of separate constitutional rights is without merit. No such "separate" constitutional right was involved in *Klein*, and no subsequent jurisprudence of this Court suggests that a direct threat to the independence of Article III courts is unreviewable unless it is coupled with some other constitutional transgression. Under both *Klein* and the more contemporary Article III analysis set forth in *Schor, supra*, Congress' attempt to decided these pending cases violated the Constitution's separation of powers.

## ARGUMENT

### I. SECTION 318(b)(6)(A) DOES NOT AMEND ANY LAWS, BUT RATHER DICTATES AN OUTCOME IN PENDING LITIGATION

The petitioners do not waste time arguing that Congress may constitutionally decide pending cases. Rather, petitioners devote the majority of their brief to arguing that § 318(b)(6)(A) simply amended the laws at issue in the cases specified in § 318(b)(6)(A). Although the language of § 318(b)(6)(A) does not expressly purport to amend any laws, petitioners deduce an intent to amend from the statement:

> Congress hereby determines and directs that management of areas according to subsections (b) (3) and (b) (5) of this section...is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.[2]

Petitioners' inventive interpretation is contrary to the language of the section, its legislative history, and indeed its very purpose.

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2 The "Statutory requirements" at issue in the identified cases are the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq.*; the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*; the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*; and the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181(a).

### A. The Plain Language of § 318(b)(6)(A) Reveals That Congress Did Not Intend That Provision To Repeal Existing Laws

"'Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute...' or judicially rewriting it."

*Apetheker v. Secretary of State,* 378 U.S. 500, 515 (1964) (*quoting Scales v. United States,* 367 U.S. 203, 211 (1961)). *See also Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379 (1933) (statutory construction should not be pressed "to the point of disingenuous evasion to avoid a constitutional question."). As the Court recently observed in *Northern Pipeline Co. v. Marathon Pipeline Co.,* 458 U.S. 50, 86 (1982), Congress may not itself exercise Article III powers "behind the facade of a grant to the district courts...."

Petitioners argue that § 318(b)(6)(A) was "*intended* to establish the procedures that would govern timber sales on a one-year basis and on specified public lands, and...Congress *intended* that these procedures would not be impeded or modified by the applicability of other environmental statutes." Petitioner's brief at 20 (emphasis added). Petitioners invocation of congressional intent is surprisingly devoid of any *analysis* of congressional intent, and in fact is contradicted by the plain language of § 318(b)(6)(A). Section 318(b)(6)(A) does *not* expressly mention amending any existing legislation. Rather, it affirmatively refers to existing "statutory requirements" and determines that specified agency actions will constitute "adequate consideration for *meeting* the statutory requirements...."

(Emphasis added.) If the statutory requirements had been amended, there would have been no need to meet them.[3]

In addition to disproving the petitioners' argument that § 318(b)(6)(A) was intended to amend existing laws, the plain language of § 318(b)(6)(A) reveals that Congress *did* intend to direct a particular outcome in these consolidated cases. Section 318 specifically refers to "the consolidated cases captioned Seattle Audubon Society, et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc., et al., v. F. Dale Robertson, Civil No. 89-99 (*order granting preliminary injunction*) and the case of Portland Audubon Society, et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR" (emphasis added). If the identification of these specific cases were simply a shorthand method of identifying the statutes that Congress intended to amend, as petitioners suggest, there would have been no need to also specifically identify the "order granting preliminary injunction." The *only* reason for specifically identifying the order granting preliminary injunction was to remove any doubt that Congress intended its finding to replace those of the

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3 Petitioners acknowledge that repeals by implication are not favored, but argue that the rule does not apply when an exemption for a federal project "could be found in the text enacted into law." Petitioners' brief at 33, note 27. This Court, however, has never adopted a "could be found in the text" exception to the rule against implied repeals. If it is clear from the text of a statute that Congress intends to modify existing laws with respect to a particular project, then it is not necessary to imply an intent to repeal. If, however, as is the case with 318(b)(6)(A), the language of the statute is clear and it is necessary to impute to Congress an intent to repeal or amend underlying laws, then the canon of construction against implied repeals applies with full vigor. Any "speculation" about the intent of § 318 is only the result of petitioners' labors. There is in fact no doubt that Congress did *not* intend § 318 to amend any existing laws.

court in the "order granting preliminary injunction."[4] Plainly, Congress intended to direct a decision in favor of the government in these pending cases, but without amending any of the laws at issue in the cases.

### B. The Legislative History of § 318(b)(6)(A) Confirms That It Was Not Intended to Amend Existing Laws, But Rather Was Directed At Pending Cases

The legislative history of § 318(b)(6)(A) confirms that it was directed at pending litigation, rather than at preexisting legislation. The Conference Report on § 318(b)(6)(A) specifically states that § 318 "in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition To Petition For Certiorari, at 122a.[5] This language was obviously

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4 Neither Petitioners nor their supporting amici address this reference in § 318(b)(6)(A) to the "order granting preliminary injunction." It is a cardinal rule of statutory construction, however, that statutes will be construed whenever possible to give meaning to each word. *See* 2A J. Sutherland, *Statutes and Statutory Construction*, 46.06 (C.Sands 4th ed. 1984); *American Stores Co. v. American Stores Retirement Plan*, 928 F.2d 986, 990 (10th Cir. 1991). The only plausible meaning of this language is that the "direction" given in § 318(b)(6)(A) is targeted to the courts in the named cases.

5 Petitioners address this legislative history only in a confusing footnote, where they argue that § 318(b)(6)(A) does not "preclude further judicial challenge to the adequacy of preexisting administrative documents." Petitioners' Brief at 30, n.22. That does not change the fact that Congress left the environmental laws at issue in the litigation in place, while at the same time determining that defendants' action during fiscal year 1990 would satisfy those laws. An exercise of judicial power by the legislative branch is no less a violation of the separation of powers because the violation will last for a limited period.

intended to reassure those members of Congress concerned with "application of...environmental laws to Forest Service and BLM management activities" that § 318 did not attempt to alter those laws, out of fear that an attempt to amend the laws could not garner the votes necessary for passage.[6]

Other members of Congress clearly *were* opposed to any attempt to amend the underlying laws. Over 100 members of the House of Representatives signed a letter opposing any such amendment. *See* Appendix B to the brief of Respondents. Following the publication of this letter, the Conference Committee rejected Senate language that *would have* amended the legislation at issue in these consolidated cases,[7] and instead adopted § 318(b)(6)(A). The Conference Committee then assured members of Congress that § 318(b)(6)(A) "in no way" amended existing legislation.

The legislative history of § 318 not only confirms that it was not intended to amend existing laws — it also confirms

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6 This legislative history resolves any ambiguity that might be present in the language of § 318(b)(6)(A). As this Court has recently noted, Congress may not "evade the 'carefully crafted' constraints of the Constitution..." by attempting to do indirectly what it may not do directly. *Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2308 (1991).

7 *See* S. Rep. No. 101-85, 101st Cong. 1st Sess. (July 25, 1989) (requiring that specified timber sales be awarded and operated "notwithstanding any provision of law that is the basis for any stay, restraining order or injunction issued in [these cases]."). This language would have amended the underlying laws for purposes of the specified sales. *See e.g., Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (law stating that bridges were lawful structures, "anything in any law or laws of the United States to the contrary notwithstanding," amended preexisting laws). Petitioners argue that Congress is entitled to change substantive laws while litigation is pending, and courts must apply the law as it stands at the time of decision. *See* Petitioners' brief at 44. While this is true, it does not aid petitioners' argument unless the Court first concludes that Congress *did* alter existing laws — a conclusion plainly at odds with the language and legislative history of § 318(b)(6)(A).

that § 318(b)(6)(A) *was* directed at the cases not before the Court. The purpose of § 318(b)(6)(A) was, as petitioners concede, to "avert a looming crisis." Petitioners' brief at 17. In fact, the conference report on § 318 reveals:

> The managers have agreed to this provision *because* a large portion of the Forest Service's and Bureau of Land Management's (BLM) fiscal year 1989 timber sale programs...have been interrupted due to legal challenges....

H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition to Petition for Certiorari, at 117a (emphasis added).

The "looming crisis" that § 318(b)(6)(A) was intended to avert was therefore created *by the very litigation that petitioners now claim is irrelevant to § 318.* This fundamental fact is obscured by petitioners' segmentation of the language of § 318(b)(6)(A), but it is pivotal in determining what Congress was attempting to do by adopting § 318. The fact that § 318 was adopted to address the "crisis" created by this litigation directly supports the conclusion that Congress' naming the specific case titles, docket numbers, and even then-current judicial orders was not merely a convenient shorthand method of identifying statutes that Congress intended to amend, but rather was a Congressional effort to resolve the cases creating the "crisis."[8]

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8 As the Senate Report stated, § 318 was necessary because of "the interdiction of nearly 60 percent of the timber sales from public lands in Oregon and Washington...as a result of court actions filed in U.S. district courts...the Committee's immediate concern is the potential of considerable economic disruptions...if the injunctions remain in place." S. Rep. No. 101-85, 101st Cong. 1st Sess. at 120 (July 25, 1989).

The Conference Committee Report states, with respect to 12 sites specifically designated in subsection (b)(5) of § 318: "This expanded reservation of areas for spotted owls again is deemed adequate to address for fiscal year 1990 only the concerns raised in the *Portland Audubon Society v. Lujan* case." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition To Petition For Certiorari, at 120a–121a. Plainly, Congress was attempting to dictate an outcome in these specific cases for fiscal year 1990.

### C. Petitioners' "Deeming" Argument Is Simply A Recast of Their "Amendment" Argument, And Should Be Rejected On the Same Ground As Their Amendment Argument

Petitioners' final argument with respect to the interpretation of § 318(b)(6)(A) is that it "provides, at most, a legal characterization, operating as a deeming provision or legislative presumption." Petitioners' brief at 17. This, however, is simply another way of stating Petitioners' argument that Congress "amended" the legislation at issue in the listed cases, as opposed to issuing a "rule of decision" for those cases. Since Congress expressly did *not* intend to amend existing legislation, petitioners' "deeming" argument should

be rejected on the same grounds as its "amendment" argument.[9]

Petitioners admit that, for § 318(b)(6)(A) to operate as a "deeming provision or legislative presumption," Congress must have intended to "prescrib[e] governing substantive legal standards — a legislative function...." *Id.* at 17-18. Yet that is precisely what the authors of § 318(b)(6)(A) assured the other members of Congress they were *not* doing. The prescription of "governing legal standards" for the laws "at issue" in the instant cases necessarily would amend the "governing legal standards" *already* present in those laws. Petitioners' "deeming" argument ignores Congress' specific statement that it did *not* intend to amend any existing laws, and the argument is without merit.

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9 Petitioners argue that under the court of appeals' decision in this case, either Congress is constitutionally barred from deeming that certain action complied with existing laws, or it may not mention specific cases when doing so. Petitioners' brief at 27. Petitioners argue that the first result would unreasonably restrict Congressional power, and the second is based upon an artificial distinction. *Id.* But it is not at all artificial to say that when Congress identifies specific pending litigation in "deeming" that certain conduct satisfies existing laws, it is impermissibly interfering in that litigation. If no litigation was pending, it would be difficult to argue that Congress was interfering in pending litigation. When litigation *is* pending, however, and Congress specifically identifies it in a statute, Congressional intent to intervene in that litigation is much more easily discernible.

## II. CONGRESS MAY NOT CONSTITUTIONALLY DICTATE OUTCOMES IN PENDING CASES

This Court has long recognized that Article III, § 1, of the United States Constitution, together with the doctrine of separation of powers, prevents Congress from "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein,* 80 U.S. (13 Wall.) 128, 146 (1872).[10] "Article III, § 1, 'was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision.' " *Commodity Futures Trading Comm'n. v. Schor,* 478 U.S. 833, 848 (1985) (citing Currie, *Bankruptcy Judges and the Independent Judiciary,* 16 Creighton L. Rev. 441, 460, note 108 [1983]).

A statute violates the Constitution's separation of powers if "it prescribe[s] a rule of decision in a case pending before the courts, and [does] so in a manner that require[s] the courts to decide [the case] in the Government's favor." *United States v. Sioux Nation of Indians,* 448 U.S. 371, 404 (1980). As the Court explained in *Vermont v. New York,* 417 U.S. 270, 277 (1974): "Article III speaks of the 'judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations." This function of applying the law to the facts of particular cases lies at the core of the judicial power assigned to the federal judiciary by the Constitution, and it

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10 Article III of the Constitution provides that the judicial power shall be vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. U.S. Const. Art. III, § 1. The judicial power extends to all cases and controversies, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority. U.S. Const. Art. III, § 2.

is this power that Congress has invaded by directing a particular rule of decision in these cases.[11]

### A. When Congress Attempts to Decide Pending Cases, No Further Constitutional Analysis is Required

Some intrusions into Article III powers are so fundamental that no extended analysis is required to detect a violation. That is the case where, as here, Congress directly intervenes in pending litigation in order to decide the pending controversy. In this respect these cases are directly analogous to *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872). The facts surrounding the *Klein* decision illustrate how Congressional intrusion into judicial decisionmaking in pending cases can violate Article III.

Immediately prior to its decision in Klein, the Court had determined, in *United States v. Padelford,* 76 U.S. (9 Wall.) 531, 542 (1870) that receipt of a Presidential pardon for

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11 The legislative history of § 318 makes clear the judicial nature of the power exercised by Congress. The Conference Report accompanying Public Law No. 101-121 admits that Congress stepped into these cases:

> *because* [plaintiffs'] challenger raise serious concerns about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl and minimizing fragmentation of old growth stands. The managers are extremely concerned that the agencies did not pursue avenues to resolve the conflicts or more adequately addressed the issues raised in these legal challenges, thereby requiring the inclusion of this section.

H.R. Conf. Rep. No. 101-264, 101st Cong., 1st Sess., at 87 (1989) (emphasis added). In other words, Congress made a preliminary determination that the federal petitioners were violating the law in these cases, but prescribed a remedy for those violations — a congressionally directed temporary disposition of these laws — that allowed petitioners to continue violating the unchanged underlying law.

participating in the rebellion during the Civil War constituted conclusive proof of loyalty to the United States. Following the *Padelford* decision, Congress adopted a law stating that receipt of a Presidential pardon could *not* be used as proof of loyalty, and that acceptance of a pardon would be conclusive proof of *disloyalty*. Act of July 12, 1870, ch. 251, 16 Stat. 235.

The court of claims, prior to the *Padelford* decision, had awarded the administrator of Klein's estate the proceeds from a sale of Klein's property seized after the war. Klein had aided the rebellion but subsequently obtained a pardon. After Congress adopted the Act of July 12, 1870, making receipt of a pardon proof of disloyalty, the United States appealled the court of claims' award to this Court, arguing that the 1870 Act now compelled a different conclusion than the Court had reached in *Padelford*. The Court found that the Act of July 12, 1870, violated the Constitution's separation of powers because it denied the courts jurisdiction in then-pending cases based "solely on the application of a rule of decision...prescribed by Congress." 80 U.S. (13 Wall.) at 146.

The intervention by Congress into the Article III powers of the Court in this case is even more direct and intrusive than in *Klein*. In *Klein* the Court had to infer Congressional intent to decide pending cases from the fact that the law in question was adopted shortly after the *Padelford* decision and appeared to be directed at that decision. Here, no such inference is necessary. Congress has identified not only the

"rule of decision," but also *the very cases in which it is to be applied.*[12]

Congress' direct use of Article III powers is obvious and immediate in these cases, and intrudes directly into pending litigation. This distinguishes these cases from other, more recent, Article III challenges that the Court has considered. In *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986) for example, Congress empowered the Commodity Futures Trading Commission to undertake quasi-judicial determinations while implementing a broad regulatory scheme adopted by Congress. The question in *Schor* was whether Congress had assigned Article III powers to a non-Article III administrative agency. The Court's Article III analysis was directed to Congress' power to create non-article III forums which performed Article III-type functions. *See also Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568 (1985) (Congress may create system for voluntary arbitration of claims for compensation arising from follow-on use of trade secret

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12 Petitioners attempt to distinguish *Klein* by arguing that *Klein* "involved an attempt to manipulate the subject matter jurisdiction of the courts in order to reach an unconstitutional result," whereas in this case "Section 318(b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines, but Section 318 permits judicial review of other statutory and constitutional claims, including compliance with Section 318 itself." Petitioners' brief at 43 (emphasis added). This is not accurate. While § 318(b)(6)(A) does allow judicial review of claims under statutes other than those under consideration in the listed cases, as well as review of other claims under these same statutes, § 318(b)(6)(A) "manipulates the subject matter jurisdiction of the courts" by directing that compliance with subsections (b)(3) and (b)(5) is "adequate consideration for the purpose of meeting the statutory requirements *that are the basis for [these] consolidated cases captioned....*" As petitioners successfully argued in the district courts below, this language effectively precluded the courts in the two cases specifically identified in § 318(b)(6)(A) itself from applying the law *in those cases* to the facts *in those cases* in any manner other than that dictated by Congress. Of course, as the district courts failed to acknowledge, such an outcome violates the separation of powers.

information in the registration of pesticides); *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (Congress may not vest Article III powers in non-Article III bankruptcy judges).

The analysis used in these cases is not necessary when determining whether Congress itself may decide a pending case.[13] The Court should, therefore, as it did in *Klein*, simply identify the Article III intrusion in the instant cases for what it is. The extended analysis of *Schor*, which has traditionally been applied only to Congressional allocation of adjudicative powers to the Executive, is simply inapplicable. Even under the *Schor* analysis, however, § 318(b)(6)(A) violates the separation of powers.

### B. Section 318(b)(6)(A) Violates the Constitution's Separation of Powers Under More Contemporary Jurisprudence

Although Klein applies directly and should govern the outcome in these cases, the Court has not expressly limited its Schor analysis to cases involving Congressional creation of non-Article III forums that exercise quasi-adjudicative powers. Accordingly, this section of the brief addresses § 318(b)(6)(A) in the context of the *Schor* analysis. That

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13 If Congress, for example, were to disagree with a decision of the Commodity Futures Trading Commission on a counterclaim presented by a broker, Congress could not legislatively reverse the decision of the Commission without running afoul of Article III. The Commission may properly exercise adjudicative power in part *because* that exercise is reviewable by an Article III court. Absent specific statutory authorization, however, legislation reversing a Commission decision would not be reviewable by an Article III court, and would therefore arrogate entirely to Congress an adjudicative power assigned by the Constitution to the judiciary.

analysis leads in any event to the same conclusion as *Klein*, and usefully illustrates the Article III problems arising from Congressional intrusion into pending cases. In *Schor* the Court framed the inquiry in cases involving Article III challenges to powers granted to the Executive branch as follows:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary (citation omitted). Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

478 U.S. at 851. *See also Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 583 (1985). Applying the *Schor* factors to § 318 reveals the extent to which § 318(b)(6)(A) intrudes on the Article III powers of the courts. The *Schor* factors also reveal the absence of any compelling reason for such an intrusion.

### 1. Section 318 erodes the essential attributes of judicial power

Nothing is more an "essential attribute of the judicial power" than deciding how the existing statutes at issue in these consolidated cases apply to the facts of the cases.[14] *See Schor, supra,* 478 U.S. at 851. *See also Klein, supra,* 80 U.S. (13 Wall.) at 146; *Pope v. United States,* 323 U.S. 1, 11, 12 (1944) (even in cases where Congress has consented to judgment, judicial function is preserved so long as an Article III court applies law to facts in order to reach that judgment). Congress simply may not take away from Article III courts the core judicial function of applying the law to the facts in the context of a particular dispute. Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 84-86 (1982).

Although not briefed by petitioners, the fact that § 318(b)(6)(A) is arguably a public law may be relevant in applying the *Schor* analysis.[15] The plurality opinion in *Northern Pipeline* suggested that Congress might have greater leeway to delegate Article III-type powers to a non-Article III forum when "public rights" are involved. *See Northern Pipeline, supra,* 458 U.S. at 71. As the Court subsequently noted in *Thomas, supra,* 473 U.S. at 585-589, however, "[t]he theory that the public rights/private rights

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14 As the Court noted in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982), Congress may exercise Article III powers only if there is an "exceptional grant of power" flowing from an independent source in the federal constitution. The petitioners do not suggest that any independent source of power in the Constitution would authorize the exercise of Article III powers in this case.

15 The petitioners do argue that § 318(b)(6)(A) represents an exercise by Congress of its powers under the Property Clause, and the Congress' powers are at their zenith when exercised pursuant to such a specific Constitutional authorization. *See* Petitioners' brief at 18, 39. The fact that petitioners have identified a possible Constitutional source for Congress' power, however, does not further the analysis of whether that power was exercised in a constitutionally infirm manner.

dichotomy...provides a bright line test for determining the rights of Article III did not command a majority of the Court in *Northern Pipeline*....In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on judicial powers is reduced."[16]

Where, as here, the Executive branch *itself* is the "regulated" entity (as opposed to being the entity accused of improperly exercising Article III powers), and the question is whether the Executive branch has complied with existing laws, the question cannot "be conclusively determined by the Executive and Legislative Branches." While administrative agencies may generally exercise quasi-judicial powers in appropriately prescribed circumstances without violating Article III, such determinations do not threaten the power of Article III courts in part because Article III courts may ultimately review the administrative decision. *See Northern Pipeline, supra,* 458 U.S. at 78-79 ("this Court has sustained the use of adjunct factfinders...so long as those adjuncts were subject to sufficient control by an Article III district court.") *See also United States v. Raddatz,* 447 U.S. 667, 681-683 (1980) (upholding the Federal Magistrates Act against an Article III challenge in part because magistrate decisions were subject to review by Article III judges); *Thomas, supra,* 473 U.S. at 592 ("FIFRA limits but does not preclude review of [voluntary] arbitration proceeding[s] by an Article III court."); *Atlas Co. v. Occupational Safety & Health Review Comm'n.,* 430 U.S. 442, 455 (1977)(Congress

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16 To qualify as involving a "public right," the dispute "must at a minimum arise 'between the government and others.'" *Northern Pipeline, supra,* 458 U.S. at 69 (citing *Ex Parte Bakelite Corp.* 279 (U.S. 438, at 451 [1929]). The Court provided examples of what might constitute "public rights," citing *Crowell v. Benson,* 285 U.S. 22, 51 (1932).

could assign adjudication of "public rights" to administrative agency because judicial review by Article III courts was available).

Under § 318(b)(6)(A), there is no opportunity of an Article III court to review the Congressional determination that the Executive branch has complied with existing laws. Rather, Congress itself performed the function of applying existing laws to facts at issue in these cases, and directed the Article III courts to implement its decision. Rather than insuring independent review by an Article III court, Congress divested Article III courts of this "essential attribute[] of the judicial power." *Northern Pipeline, supra,* 458 U.S. at 87.[17] The fact that it applied public laws in doing so does not alter the nature or unconstitutional effect of the intrusion.

### 2. The right to hold the government accountable to the rule of law is of primary importance

The "origin and importance of the right[s] to be adjudicated" in these cases also suggest that Congress acted improperly by stepping in and deciding the cases. *Schor, supra,* 478 U.S. at 851. The "rights to be adjudicated" are established in environmental legislation imposing nondiscretionary obligations on federal agencies. *See, e.g.,* 42 U.S.C. § 4332 (NEPA) ("all agencies of the Federal Government

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17 In *Northern Pipeline,* the Court's conclusion that Congress had placed the "essential attributes of the judicial power" in the hands of non-Article III bankruptcy judges was based in part upon the fact that the power of Article III judges to review the decisions of bankruptcy judges was limited to review for "clear error." Bankruptcy judge orders also could become final judgments, even in the absence of an appeal to an Article III judge. *Northern Pipeline,* 478 U.S. at 85-86. In these cases the Article III intrusion is even more clear, since there is *no* opportunity for Article III review of Congress' determination that the petitioner's conduct satisfies the underlying laws.

*shall* (prepare EIS's on) major Federal actions significantly affecting the quality of the human environment") (emphasis added); 16 U.S.C. § 1604(e), (f) ("required assurances" and "required provisions" for plans governing the national forests).

Since petitioners are themselves the regulated entities under these laws, the Executive branch cannot be expected to perform the law *enforcement* role it typically fulfills when regulating the private sector.[18] The Congressional intrusion into the Article III powers of the courts, therefore, leaves compliance with these laws to the unfettered discretion of the very agencies that are *subject to* the laws, and who have been accused of violating the laws in pending cases.[19] The only "review" is that of Congress, which has absorbed the adjudicative role of the courts. Such a result threatens the rule of law and the Constitution's carefully crafted separation of powers.

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18 *See* Memorandum of John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, to Representative John D. Dingell, Chairman, Subcommittee on Oversights and Investigations (1985) (concluding that the separation of powers doctrine prevents courts from adjudicating inter-agency disputes when both agencies belong to the Executive branch, because two agencies in a single branch of government cannot create a constitutional "case of controversy." (cited in M. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 Harv. Envt'l. L. Rev. 1, 11, note 33 (1988).

19 It is no answer to claim that judicial review is still available for agency compliance with §§ (b)(3) and (b)(5). Those subsections do not alter the preexisting and independent commands of NEPA, NFMA, FLPMA, OCLA, and MBTA.

### 3. The concerns that drove Congress to assume Article III powers are marginal

The "concerns that drove Congress to depart from the requirement of Article III" when it adopted § 318 are hardly compelling; those concerns were that the courts had enjoined the federal defendants from violating the law. Excusing federal agency violations of law, without altering the law itself, is not a "compelling reason" for Congress to invade the judicial province.[20] In *Schor,* this Court found "readily understandable" Congress's concern with "creating an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA [Commodities Exchange Act] against professional brokers." 478 U.S. at 855. And in *Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568, 590 (1985) the Court found that Congress's grant of adjudicatory power to a non-Article III arbitration process was justified by Congress's concern with "spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product."

In this case, an alternative that would have met Congress's concerns without intruding into pending litigation was available to Congress — simply modifying the underlying legislation. Instead, Congress chose this unconstitutional route.[21] To make matters worse, Congress

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20 It is no answer to say that Congress was also concerned with the *effects* on timber supplies of judicial rulings that the Petitioners were violating the law; there is no question that Congress had the power to alter the laws (rather than directing the courts to reach a different result under existing laws) if it wished to alleviate the effects of enforcing those laws.

21 As we discussed below, the fact that Congress could have achieved the same ends through means that did not violate the Constitution does not, as petitioners argue, permit the Court to ignore the unconstitutional means actually chosen by Congress.

adopted the offending provision *not* through the regular legislative process, where it would have been considered by committees with authority over the agencies' conduct and substantive legislation, but rather through the appropriations process, where it received virtually no serious consideration by Congress as a whole.

The Supreme Court has made clear that, although substantive legislation may be adopted through the appropriations process, that is a disfavored method of law-making. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). That is because "[t]he rules of both Houses 'prohibit legislation' from being added to an appropriation bill." *Andrus v. Sierra Club*, 442 U.S. 347, 359-60 (1979) (citing Fisher, *Budgets Concepts and Terminology: The Appropriations Phase*, in 1 *Studies in Taxation, Public Finance and Related Subjects - A Compendium*, 437 (Fund for Public Policy Research 1977); Standing Rules of the U.S. Senate, Rule 16(4); Rules of the House of Representatives, 96th Cong., 1st Sess., Rule XXI(2) (1979); 7 C. Cannon, *Precedents of the House of Representatives*, §§ 1172 *et seq.* [1936]). This distinction "is maintained to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation." 442 U.S. at 361 (citing *House Budget Committee, Congressional Control of Expenditures*, 19 [Comm. Print 1977]).

### 4. This Case involves a threat to the independence of the courts, rather than a denial of access to an individual claiming invasion of an independent Constitutional right

The Petitioners argue that independent provisions in the Constitution, such as the Due Process Clause and the Takings Clause, restrict Congress' ability to change the law and affect pending cases, and that "[t]he role of Article III is not as a back-up for those specific provisions, addressing the same subject a second time if no violation of the directly pertinent provision has been found." Petitioners' brief at 35. Petitioners also argue that "deeming" provisions may only be challenged on constitutional grounds when they implicate a "liberty or property interest protectable under the Due Process Clause which would limit Congress' use of a conclusive presumption in defining compliance with such enactments." Petitioners' brief at 38. Petitioners cite no authority for such a narrow reading of Article III, and indeed there is none.[22]

This Court has recognized both structural and individual dimensions to Article III's scope. *See Schor, supra,* 478 U.S. at 831. An act of Congress can certainly pose a structural threat without invading a constitutionally protected individual interest. In fact, that was precisely what occurred in *Klein, supra.* No individual constitutional rights were

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22 Petitioners' argument is contradicted by Petitioners' own admission that "Article III nevertheless has an important role to play in determining Congress's ability to affect pending litigation. Article III, by vesting the 'judicial power' in the judiciary (Art. III, §§ 1, 2), protects against invasion of the adjudicative function." Petitioners' brief at 36. Article III's protection of the independence of the judiciary is simply not dependent upon the existence of other constitutional provisions.

implicated in *Klein*.[23] Rather, the Court was concerned with the structural threat to the Constitution's separation of powers when Congress "deemed" that a certain fact (obtaining a pardon) would have congressionally determined consequences (proof of disloyalty) in a pending case without changing the law that otherwise governed the legal issues of loyalty and disloyalty. A structural threat to Article III and the separation of powers *arises* from a "deeming" provision when such a provision is expressly directed at deciding pending litigation.

The nature of the concern in *Klein*, as in the instant cases, *was not* that an individual was improperly denied access to an Article III court, but rather that Congress has upset the balance of powers established by the Constitution. Article III of the Constitution placed judicial power in the hands of an independent judiciary because "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217-18 (1980). In § 318(b)(6)(A), Congress has attempted to control the core judicial power of Article III courts in two pending cases. That violates the Constitution's separation of powers.

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23 The Court in *Klein* also concluded as an alternative holding, that the challenged Congressional action violated the separation of powers by intruding on the Executive's pardon powers. That conclusion, however, was distinct from, and *not* a predicate to, its holding with respect to the invasion of Article III powers.

## CONCLUSION

The court of appeal's opinion that § 318(b)(6)(A) violates the Constitution's separation of powers is correct and should be affirmed.

Respectfully submitted,

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